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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 534

J. W. SPENCE, doing business as GEFF SEED AND GRAIN COMPANY, *Petitioner*,

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY, a Corporation, *Respondent*.

To the United States Court of Appeals for The Seventh Circuit.

REPLY OF PETITIONER TO BRIEF OF RESPONDENT IN OPPOSITION FOR WRIT OF CERTIORARI

LESLIE N. JONES
Box 98
Flora, Illinois

F. S. FEIGER
Box 279
Fairfield, Illinois

JOHN C. ROBISON
Box 279
Fairfield, Illinois

GERALD T. QUINDRY
Box 279
Fairfield, Illinois

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This case does not involve any question of the rationing of existing cars nor any discrimination resulting from that rationing. We do not doubt we get our fair share of the *existing* facilities of Respondent; we only point out that the *existing* facilities are inadequate. There was presented below and we are presenting here one single question: If the facilities of a carrier is in-

adequate to serve normal transportation requirements, have the damaged shippers any remedy?

As we stated in our petition, the case arises from a long standing, continuous and serious car shortage, which is normal to the territory served by Respondent and is not the product of a temporary emergency or some vagrant seasonal demand. This shortage has its origin in the failure of Respondent to replace or repair worn out cars; consequently the amount of facilities, particularly box cars suitable for grain, is constantly decreasing. Petitioner urges the matter is within the jurisdiction of the Federal Courts whereas Respondent, in effect, alleges there is no remedy.

Respondent in its brief in opposition to the granting of the writ here prayed, primarily argues two legal conclusions:

(1) The case of *United States vs. Pennsylvania Railroad Company*, 242, U. S., 208, holds that the Interstate Commerce Commission has no authority to require a carrier to acquire the facilities necessary to discharge its normal duties to furnish reasonable transportation service, but

(2) Notwithstanding this lack of authority of the Commission any action with respect to the situation must be brought before the Commission and not before the Federal Courts.

This, of course, is in effect an argument that there is no way to compel a carrier to discharge its clear legal duty to furnish adequate transportation.

We agree with Respondent that the Interstate Commerce

Commission has no authority to compel the carrier to maintain adequate facilities. We do not agree, however, that the Federal Courts are equally impotent. We urge that the case of *United States vs. Pennsylvania Railroad Co.*, supra, expressly recognizes the power inherent in the Courts to compel the furnishing of adequate service, even if it is necessary for the carrier to acquire facilities to do so.

Respondent further argues that the Commission has primary jurisdiction over the rationing of *existing* cars and facilities and the curing of any discrimination which might result from that rationing. Here again we agree. Respondent sets forth at great length what has been done both by the carriers and by the Commission with respect to the marshalling and handling of the *existing* cars. This, however, is not the case presented. We are not complaining about the rationing or handling of *existing* cars, but, recognizing that the total number of *existing* cars is insufficient to serve the normal transportation requirements of the territory, we urge that the Courts compel the carrier to furnish reasonable service even if it is necessary for it to acquire additional facilities to do so.

If the facilities of a carrier have worn out to the extent that it is no longer possible to supply reasonable service under normal conditions of transportation, there must be some remedy for the public. Since both petitioner and Respondent agree that the Commission has no such authority, we think it is clear that the Courts, of necessity, have it. Furthermore, we think it is

quite clear that the case of *United States vs. Pennsylvania Railroad Co.*, supra, reaches this specific conclusion.

Ultimately, Respondent's argument means that so long as there is one car in the possession of the Respondent railroad, the Interstate Commerce Commission may specify what should be done with that one car and thus defeat the jurisdiction of the Courts. We submit such a situation is intolerable. We recognize, of course, that during the peak of grain movement there must be some delay but don't concede that a carrier can let it's equipment deteriorate and worsen over a period of time to the point of failure, such as is apparent in this case.

Respectfully submitted.

LESLIE N. JONES
Box 98
Flora, Illinois

F. S. FEIGER
Box 279
Fairfield, Illinois

JOHN C. ROBISON
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Box 279
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